No. 88-726

Supreme Court, U.S.
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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1988

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CHARLES McDOWELL,
ED FOSSETT, and
SAM SERAGLIO, - - - - - - Petitioners

*versus*

ROBERT BARNES, - - - - - - Respondent

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## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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1988

## QUESTIONS PRESENTED

1. Is an England reservation necessary if there is nothing in the relevant state law of judgments that would preclude an individual from bringing a lawsuit in federal court pursuant to 42 United States Code section 1983?

2. Does the Kentucky law of judgments bar a lawsuit brought pursuant to 42 United States Code section 1983 where the plaintiff has previously unsuccessfully availed himself of an administrative procedure, as well as judicial review of that procedure, whereby he was able to challenge the propriety of his dismissal from state employment upon various state law grounds?

3. Does the mere existence of an otherwise valid reason for discharging a public employee preclude the possibility that a motivating factor in his dismissal was constitutionally impermissable so that he could recover under 42 United States Code, section 1983?

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## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## STATEMENT OF THE CASE

The Respondent, Robert Barnes, adopts and incorporates by reference into this Brief the factual outline of this case set forth by the United States Court of Appeals for the Sixth Circuit in its opinion, which may be found at pages 2a-11a of the Petitioners' Appendix, with the following addition and caveat, respectively: Respondent is totally blind, and the Kentucky Personnel Board ultimately concluded that it could not consider Respondent's alleged sexual harassment of one Anna Fay Katon in any manner in disposing of Respondent's "appeal" to it of his discharge (See Petitioner's Appendix, pp. 60a-61a, contradicting footnote 1 of the Opinion of the Sixth Circuit, Petitioner's

Appendix, p. 3a). Respondent especially directs the Court's attention to footnote 4 of the opinion of the Court of Appeals at pp. 5a-6a of Petitioner's Appendix, where the Court sets forth verbatim the portions of the Respondent's original complaint describing the content of the speech that he believes let the Petitioners to bring about his discharge from employment with the Commonwealth of Kentucky.

Respondent also adopts and incorporates by reference into this Brief the Sixth Circuit's description of the procedural genesis of this case, as set forth to some extent at pp. 2a-11a of Petitioners' Appendix but mostly at pp. 11a-13a, with only the caveat that the decision of the Kentucky Court of Appeals against Respondent was on a 2-1 vote, Judge Miller dissenting.

## REASONS FOR NOT GRANTING THE PETITION

### I

### An *England* Reservation Is Not Necessary Where, as Here, There Is Nothing in the State Law of Judgments That Would Preclude an Individual From Bringing a Lawsuit in Federal Court Pursuant to 42 United States Code Section 1983, and to the Extent That the Opinion of the Court of Appeals Appears to State Otherwise, It Is Simply *Obiter Dicta*.

The Respondent believes that this Court need not consider the propriety of the discussion of the Court of Appeals of the case of *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S. Ct. 461 (1964) for the simple reason that no *England* "reservation" was ever necessary in this case. This being the case, there was simply no need for the Court

to discuss the *England* opinion, and its discussion of England was therefore *obiter dicta.*

In *England,* a case that was apparently not prosecuted as a damages claim under 42 United States Code section 1983 but rather a direct attack upon the Constitutionality of a state statute, this Court was faced with a situation where certain individuals had in a Louisiana Court:

> . . . unreservedly submitted for decision, and briefed and argued, their contention that the [Louisiana] Act [making certain educational requirements for chiropractors], if applicable to chiropractors, violated the Fourteenth Amendment,

*Id.,* 374 U.S. at 413-414, 84 S. Ct. 463-464. The plaintiffs brought the same claim into the proper United States District Court as well as a Louisiana Court. The federal Court dismissed the claim upon the basis that the Louisiana Courts had decided the Constitutional issue at stake.

Because the plaintiffs in *England* had been forced into the Louisiana courts by the federal court in which they had originally filed their Constitutional challenge and because they mistakenly believed that they were obligated under *Government and Civic Employees Organizing Committee, CIO* v. *Windsor,* 353 U.S. 664, 72 S. Ct. 838, 1 L.Ed. 2d 894 to raise all federal issues in the Louisiana courts under these circumstances, this Court reversed the dismissal of the plaintiffs' claims by the lower federal courts involved, *England, supra,* 375 U.S. at 422-423, 84 S. Ct. at 468.

Although the *England* opinion does not say so specifically, it is obvious that the lower federal Courts had acted as they did because of the full faith and credit doctrine, *Id.*, 375 U.S. at 414, 84 S. Ct. at 464. This Court, in reversing the lower Courts, created a method whereby litigants may *avoid* the application of this doctrine. The method, of course, is known as the *England* reservation.

*England* was decided before this Court specifically held that full faith and credit must be given to state court judgments by Federal courts in actions brought pursuant to 42 United States Code section 1983. The reasoning for such a rule of law is that it is required by the language of 28 United States Code section 1738. The rule was set forth in a trilogy of cases, *Allen* v. *McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980), *Migra* v. *Warren City School District Board of Education*, 465 U.S. 75, 102 S. Ct. 892, 79 L. Ed. 2d 56 (1984) and *University of Tennessee* v. *Elliott*, —— U.S. ——, 106 S. Ct. 3220 (1986).

Defendants in many section 1983 actions, and even some federal district courts, seem to believe that these cases require the dismissal of section 1983 actions whenever a defendant can show that in some way, however remote, a plaintiff has initiated some state proceedings relating to his Constitutional claims. Of course, this is not so. *Allen*, *Migra*, and *Elliott* simply and plainly held that section 1983 actions are subject to the same preclusion defenses as other actions, and that these defenses are to be analyzed according to the law of the state whose courts or agencies produced papers that

arguably support the defenses, *Migra, supra,* 104 S.Ct. at 896, *Elliott, supra,* 106 S.Ct. at 3227.

One method whereby plaintiffs have been able to avoid the application of preclusion defenses in section 1983 actions, of course, is by filing an *England* reservation in any state proceedings that could conceivably give rise to papers that might be argued to bar a federal section 1983 claim. However, common logic dictates that the failure to file such a reservation can never in and of itself defeat a section 1983 action. *Only* the application of the relevant state law of judgments can do that under *Allen, Migra,* and *Elliott.* Thus where a plaintiff can persuade a federal court that papers presented by his adversary do not preclude his section 1983 action under applicable state law, he is entitled to proceed with that action, *England* reservation or no *England* reservation. That is precisely what happened in the case at bar.

The Court of Appeals determined that Respondent's state administrative and judicial proceedings that resulted in various papers advanced by Petitioners as precluding his section 1983 lawsuit did not constitute the same "cause of action" as the section 1983 suit, thereby defeating the defense of claim preclusion ("res judicata") under Kentucky law (Petitioner's Appendix, pp. 11a-12a). It also determined that Respondent's state proceedings did not involve the Constitutional issues raised in his section 1983 action, thereby defeating the defense of issue preclusion ("collateral estoppel") under Kentucky law (Petitioner's Appendix, pp. 12a-13a), except to the limited extent that Respond-

ent may now be said to have engaged in sexual harassment of at least one female co-worker at his former workplace with the Kentucky Bureau for the Blind (*Id.*, p. 15a).

The resolution of these issues was all that was necessary to decide Respondent's appeal in his favor. The Court of Appeals' discussion of the *England* reservation issue which none of the parties had even mentioned in passing in their briefs for the court, was simply beside the point.

## II

### The Kentucky Law of Judgments Did Not Preclude the Respondent's Section 1983 Action Under the Circumstances of This Case.

It is not without irony that the Petitioner's ground their attack upon the Court of Appeals' holding that the Kentucky law of judgments did not indicate that any of the papers produced by them were entitled to dispositive preclusive effect almost solely on the basis that the Court incorrectly determined that claim preclusion was not present in this case. This is because even the District Court agreed with the Respondent that his claim was not barred by application of the Kentucky law of claim preclusion. In fact, it specifically held that the Kentucky administrative and judicial proceedings in which the Respondent had engaged to challenge his dismissal from state employment were not the same "cause of action" as Respondent's section 1983 lawsuit (Petitioner's Appendix, pp. 26a-28a), so that claim preclusion did not apply to the Lawsuit.

The Petitioners did not appeal from this aspect of the District Court's judgment in this case. Respondent argued to the Court of Appeals that they were therefore estopped from arguing against it on appeal. He believes that they should not be heard to make this argument at this stage of the proceedings any more than they should have been heard to make it before the Court of Appeals.

Furthermore, the arguments against the lower courts' determination that the "causes of action" at issue in this case are not identical, thereby defeating the defense of claim preclusion under Kentucky law, are without merit.

Respondent's state proceedings arose when he attempted to avail himself of a statutorily created administrative procedure whereby he could challenge his dismissal from state employment. The state agency set up by Kentucky law to hear such challenges is the State Personnel Board, Kentucky Revised Statutes 18A, *et seq.*

There is no obligation under Kentucky law to raise Constitutional issues before administrative agencies such as the Personnel Board, see *Greater Cincinnati Marine Service Inc.* v. *City of Ludlow,* Ky., 602 S. W. 2d 427 (1980) as interpreted by District Judge Bertlesman in *Weaver* v. *Anderson County Fiscal Court,* 648 F. Supp. 1575, 1579-1580 (1986). In fact, the cited opinions cast considerable doubt upon the notion that Kentucky Courts would ever pay any mind to the attempts of administrative agencies to resolve Constitutional issues. In the *Weaver* case, *Id.,* Judge Bertles-

man specifically refused to give any preclusive effect whatsoever to the actions of one Kentucky administrative agency after applying the Kentucky law of judgments.

Logic would seem to demand that an action begun in a forum that is probably not even competent to determine Constitutional issues could not be described as a "cause of action" identical to a section 1983 lawsuit. Of course, under Kentucky law, such identity of cause of action is necessary before the doctrine of claim preclusion may be applied by the courts in any manner, *Blevins* v. *Johnson,* Ky., 344 S.W. 2d 375, 377 (1961).

Identity of cause of action under Kentucky law never exists merely because successive actions of one sort or another arise from the same subject matter, transaction, or state of facts, *Id.* In fact, even such an apparently innocuous difference between two lawsuits as the type of relief sought is enough, under Kentucky law, to make them separate causes of action for purposes of the application of the doctrine of claim preclusion, *Citizen's Telephone* v. *Anderson,* Ky., 291 S.W. 2d 517 (1956). Cases from the Court of Appeals that decided the case at bar indicate that it is well aware of the great reluctance of Kentucky courts to identify any proceedings begun in an administrative agency with original judicial actions, especially Constitutional actions, see *Vinson* v. *Campbell County Fiscal Court,* 820 F. 2d 194, 197 (6th Cir., 1987), *George* v. *United Kentucky Bank, Inc.,* 753 F. 2d 50, 53 (6th Cir.), *cert. denied* 471 U.S. 1018, 474 U.S. 821 (1985). There is also a recent Kentucky opinion af-

firming the right of a discharged public employee to pursue a section 1983 claim in the same state Court that affirmed his employer's discharge of him on state law grounds! *Blair* v. *City of Winchester,* Ky. App., 473 S.W. 2d 28 (1987).

Furthermore, Kentucky law provides broad discretion in both trial and appellate courts to avoid the application of claim preclusion in particular cases. As the Kentucky Court of Appeals, then the state's highest Court, said in *Floyd County Board of Education* v. *Layne,* Ky., 474 S.W. 2d 397, 399 (1972):

> . . . the doctrine of res judicata [claim preclusion] is to be applied in particular situations as fairness and justice require, and . . . it is not to be applied so rigidly as to defeat the ends of justice or so as to work an injustice.

Kentucky Courts are particularly reluctant to invoke the doctrine of claim preclusion when the issues raised in the later litigation were not clearly decided in the earlier proceedings, i.e. the clear presence of issue preclusion is almost a requisite for the invocation of claim preclusion. As the Court said in *Whittenberg Engineering and Construction Co.* v. *Liberty Mutual Insurance Co.,* Ky., 390 S.W. 2d 877, 883 (1965) previous judgments are conclusive only, ". . . if the questions of fact are . . . actually litigated and determined in the first action," even if there is identity of cause of action by some stretch of the imagination.

Of course, in the case at bar, the Court of Appeals specifically held that the questions of fact that must be

analyzed in Respondent's section 1983 action were never litigated during his state proceedings:

> When the Kentucky State Courts reviewed Barnes's discharge, the only matter determined was whether the [Personnel] Board's factual findings that the discharge was justified because Barnes had engaged in sexual harassment was supported by substantial evidence in the record. Whether the defendants' motivation for the discharge was unconstitutional simply was not an issue in the state judicial proceedings (Petitioners' Appendix, p. 12a).

Although it probably does not matter, even the Petitioners have admitted that Respondent's Constitutional issues were not directly raised before or decided by the Personnel Board any more than they were by the Courts of Kentucky when Respondent appealed to them.

Obviously, therefore, the defense of issue preclusion was no more applicable to the case at bar than the defense of claim preclusion, since under Kentucky law it is applied:

> . . . only as to matters which were necessarily involved and determined in the former action and it is not conclusive as to matters which were immaterial or unessential to the determination of the prior action or which were not necessary to uphold the judgment [Petitioners' Appendix, p. 12a, citing *Sedley* v. *City of West Buechel,* Ky., 461 S.W. 2d 556, 558 (1970)].

Finally, although the Petitioners obviously would have us believe otherwise, previous judgments in Ken-

tucky are conclusive, ". . . only upon those issues *made or tendered,*" in the earlier litigation, and not upon every issue that conceivably may have been raised in the litigation, *Bryan Brothers Packing Company* v. *Garrard,* Ky., 386 S.W. 2d 469 (1965). The issues present in Respondent's section 1983 case were neither made nor tendered to the Kentucky Personnel Board or the Kentucky courts.

Certainly, the Court of Appeals was justified in holding that neither the Kentucky law of issue preclusion nor the Kentucky law of claim preclusion offered any obstacles to Respondent's section 1983 claims in federal Court.

## III

**The Mere Existence of an Otherwise Valid Reason for Discharging a Public Employee Does Not Preclude the Possibility That a Motivating Factor in His Dismissal Was Constitutionally Impermissable So That He Could Recover Under 42 United States Code Section 1983.**

Essentially, the Petitioners attack the well-established legal rule that the existence of a Constitutionally permissable ground for disciplining a public employee, ". . . does not end [the] inquiry [into the reasons for the discipline] when a second basis is alleged to be [Constitutionally] impermissible," *Mabey* v. *Reagan,* 573 F. 2d 1036, 1044 (9th Cir., 1976). Put another way, even when retaliation for the exercise of a Constitutional right is only a partial factor in the decision to discharge a public employee, it is still unlawful, *Gray* v. *Union County Intermediate Education District,* 520 F. 2d 803 (9th Cir., 1975).

Under *Mount Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274, 97 S.Ct. 568 (1977) a Constitutional violation may certainly be found even in the face of an otherwise legitimate reason for disciplining a public employee, *Holley* v. *Seminole County School District,* 755 F. 2d 1492, 1501 (11th Cir., 1985). Indeed, federal courts must do an independent "searching review" to determine motive in such apparent "mixed motive" cases. *Id.* at 1503. Petitioners' suggestion to the contrary notwithstanding (Petitioner, p. 20), the District Court made no attempt to perform such a review, which is usually in any event a jury function, in the case at bar.

The Court of Appeals was quite correct when it opined that:

> . . . the fact that Barnes harassed females during his tenure at the Bureau does not eliminate the possibility that the real reason [for his discharge] was because he spoke out on a matter of public concern (Petitioners' Appendix, p. 15a).

## CONCLUSION

Petitioners have not once sought to invoke Rule 17 of this Court. The only issue that they have raised that would perhaps come under that rule is the *England* reservation issue, which, as we have seen, arose only because the Court of Appeals mistakenly believed that it had some application to this case. While the issue of how an *England* reservation must be effected might be a proper topic for the Court to consider, this is obviously not the case for such consideration.

Respondent requests that this Court deny the instant Petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of this Brief upon Nathan Goldman, Esq., Assistant Attorney General, Capitol Bldg., Frankfort, Ky. 40601, attorney for Petitioners, by mailing the same to him upon this the 23rd day of November, 1988.

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